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March 4, 2015

HAND-DELIVERED

Mr. Michael J. Brandi
Executive Director
State of Connecticut Elections
Enforcement Commission
20 Trinity Street
Hartford, CT 06016

Dear Mr. Brandi:

Attached please find a Petition for Declaratory Ruling and supporting Memorandum being filed with the Commission on behalf of the Connecticut Democratic State Central Committee pursuant to Gen. Stats. §§ 4-175 and 4-176 and § 9-7b-64 of the Commission's Rules of Practice.

Thank you for your attention to the processing of the Petition.

Very truly yours,

DAVID S. GOLUB

DSG/ds
Enclosures

cc: Kevin M. Ahern, Esq. (via electronic mail)

STATE OF CONNECTICUT
ELECTIONS ENFORCEMENT COMMISSION

IN RE PETITION OF CONNECTICUT
DEMOCRATIC STATE CENTRAL COMMITTEE

VERIFIED PETITION FOR A DECLARATORY RULING

Pursuant to Gen. Stats. §§ 4-175 and 4-176 and § 9-7b-64 of the Rules of Practice of the Connecticut State Elections Enforcement Commission (the "Commission"), the Connecticut Democratic State Central Committee, 30 Arbor St., Suite 404, Hartford, CT 06106, tel.: (860) 560-1175 ("Petitioner"), through counsel, hereby requests a declaratory ruling to determine its rights and obligations under conflicting provisions of federal and state campaign finance laws, as follows:

1. Under the Federal Election Campaign Act of 1971 ("FECA"), certain "Federal election activities," including voter registration and "get-out-the-vote" ("GOTV") activities in connection with elections in which federal candidates are on the ballot, must be paid for with "hard money" – *i.e.*, money which is subject to federal regulation. The use of money raised and spent on "Federal election activities" outside of the regulatory framework provided by FECA is prohibited. FECA also explicitly provides that the federal campaign finance laws, where applicable, preempt state law and occupy the field. *See* 52 U.S.C. § 30143(a).

2. To comply with federal campaign finance law, Petitioner maintains "federal" accounts, and ensures that those accounts are funded solely by money which has been contributed in accordance with federal regulations and that expenditures out of those accounts are made in compliance with federal law. Petitioner is permitted under federal law to receive (into its federal

accounts) contributions from contractors who do business with the State of Connecticut, and it is required to make expenditures out of those accounts to finance "Federal election activities."

3. Under Connecticut campaign finance law, Petitioner would be barred from using money from its federal accounts to fund voter registration and GOTV activities in Connecticut in connection with elections in which federal candidates are on the ballot if such activities mention or relate to state candidates, because federal funds are not subject to state campaign finance regulation – especially with respect to contributions made by contractors who do business with Connecticut. *See* Conn. Gen Stat. § 12(f); *see generally* Conn. Gen Stat. Title 9, Chapter 155.

4. Petitioner engages in continual voter registration and GOTV activities in Connecticut in preparation for each biennial Congressional election. Representatives of this Commission have informed Petitioner that they consider the use of federal funds to finance voter registration and GOTV activities to be a violation of Connecticut's campaign finance laws – even though federal law requires Petitioner to finance such activities out of federal funds whenever candidates for federal office are on the ballot in an upcoming election and expressly preempts state law in the same field. More broadly, the Commission has taken the position that Connecticut's campaign finance laws are controlling with respect to all communications which refer only to candidates for state office, even though such communications also constitute voter registration or GOTV activity, as defined by federal law. As the Commission recently stated in its decision in *In the Matter of Complaint by Andreas Duus, III* , Sept. 16, 2014 (File No. 2013-176):

> General Statutes § 9-612(f) does not prevent a Connecticut state contractor from contributing to the federal account of a state central party committee. However, the Commission notes there could be scenarios where the Commission might consider such contributions by a state contractor to a state central committee's federal account in connection with subsequent expenditures as problematic under Connecticut's campaign finance laws. See General Statutes §§ 9-601c, 9-612(f) and 9-622(5). See also Advisory Opinion 2014-001, *The Use of Federal and State Accounts of Party Committees*, advising that Connecticut state party committees with state and federal accounts must pay for their expenses for state candidates with money raised within the Connecticut financing system, i.e., from permissible contributions properly reported under Connecticut law. Federal law does not create a loophole in Connecticut campaign finance laws that would allow federal committees to make expenditures that are also contributions regarding Connecticut candidates. State Committees should structure their plans to comply with both state and federal law. In some instances this may mean, for example, that they cannot support state or federal candidates within the same communication . . . .

Id. ¶ 8. *See also* Commission Advisory Opinion 2014-01, p. 6 (adopted February 11, 2014).

5. Petitioners believe this statement by the Commission fundamentally misapprehends the effect of FECA preemption on Petitioner's campaign finance law obligations. Petitioner believes – contrary to the Commission's statements on this issue – that, in areas where state and federal campaign finance law overlap in their coverage, federal law occupies the field and, therefore, supersedes state law. Nonetheless, based on the Commission's position, its representatives have recently threatened Petitioner with sanctions if it fails to adhere to the Commission's view of this issue.[1]

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[1] Petitioner notes, however, that the Commission has elsewhere acknowledged that these issues reflect a "gray area," and – in a recent submission to the Federal Election Commission ("FEC") – the Commission has asked the FEC to clarify them. *See* October 12, 2014 Letter from the Commission to the FEC, re: Advisory Opinion Request 2014-16, p. 7.

6. These issues have recently arisen in connection with Petitioner's use of certain "mailers" in Connecticut's 2014 state and federal election. Those mailers, although pertaining specifically to a state candidate (Governor Dan Malloy), also – on the front and the back of each mailer – called on recipients to vote, specified the date of the election, and provided recipients with information regarding the times when polling places are open and the availability of transportation to the polls. Activities and communications that are not otherwise exempted by the regulation containing such information, when used in connection with elections in which federal candidates are on the ballot, are specifically defined in Federal election law as constituting GOTV activities, *see* 11 C.F.R. § 100.24(a)(3) (September 10, 2010) which must be financed with money subject to federal regulation.

7. Although federal regulation of such activities preempts the field, 52 U.S.C. § 30143(a); 11 C.F.R. § 108.7 (2014), and supersedes state regulation affecting the same activities, the Republican Party of Connecticut ("Republican Party"), on the eve of the most recent election, filed an action in Hartford Superior Court – challenging Petitioner's campaign finance practices based, in part, on a Petitioner's use of the mailers described above. In that action, the Republican Party sought (1) to enjoin Petitioner from using the mailer at issue, and (2) to obtain a mandatory injunction that, if granted, would have deprived the Dan Malloy for Governor Candidate Committee of funds with which to continue its campaign. *See* Verified Complaint for Declaratory and Injunctive Relief, dated October 17, 2014, in *Republican Party of Connecticut v. Democratic Party of Connecticut*, HHD CV 14-6054730-S. Although this action was subsequently dismissed due to plaintiff's failure to exhaust its administrative remedies the underlying issue of federal preemption has not been resolved and will likely re-surface in

connection with future biennial elections as Petitioner continues its voter registration and GOTV activities.[2] As a result, Petitioner has a specific, personal and legal interest in obtaining a definitive resolution of the issue set forth above.

8. In light of the foregoing facts and circumstances, Petitioner respectfully requests a declaratory ruling on the issue of whether Connecticut's campaign finance laws, including, but not limited to, Gen. Stat. 9-612(f), are preempted by federal law with respect to the funding of "Federal election activities," including voter registration and GOTV activities, when those activities relate to an election in which a federal candidate is on the ballot, even where materials used in furtherance of those activities do not refer to a candidate for federal office, and even though those materials only refer to a candidate for state office.

THE FEDERAL REGULATORY SCHEME

A. Campaign Finance Reform

9. The Federal Election Campaign Act ("FECA"), originally enacted in 1971 and now codified at 52 U.S.C. § 30101, *et seq.*, sets forth an intricate federal statutory scheme governing campaign contributions and expenditures related to federal elections. The primary purpose of the Act is to regulate campaign contributions and expenditures in order to prevent large donors from exerting undue influence over candidates for public office.

10. In 2002, Congress, concerned with the use of so-called "soft money" (*i.e.*, money contributed outside the legal framework provided by FECA and other federal regulatory restrictions) provided by national, state and local political parties, enacted the Bipartisan

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[2] The Republican Party is now pursuing the same issues before the Commission. Representatives of the Commission have informed Petitioner that the Commission does not intend to adjudicate the preemption issues raised herein.

Campaign Reform Act of 2002 ("BCRA"), Public Law 107-155 (2002). In adopting the BCRA, Congress recognized the potentially corrupting influence of campaign contributions used to influence the outcome of federal elections through indirect means, including "get-out-the-vote" activity.

11. The BCRA provides that restrictions on the use of federal campaign funds extend beyond funds used for the direct support of federal candidates and also apply to the funding of campaign activities by state political parties that can affect the outcome of federal elections – even when the activities do not specifically refer to federal candidates.

12. To prevent the use of non-federal funds to influence federal elections in an indirect manner, the BCRA expressly applies FECA campaign expenditure restrictions to any "Federal election activity" – a term defined in the Act and in the Act's implementing regulations, *see* 52 U.S.C. 30101(20)(A); 11 C.F.R. § 100.24 – irrespective of whether the activity directly supports or names a particular federal candidate or even mentions a federal election.

13. Title I of the BCRA imposes restrictions on the expenditure of funds by state and local political parties that might influence the outcome of federal elections, even when those communications only reference non-federal candidates. The Act defines "Federal election activity" to mean any of the following:

> **(i)** *voter registration activity* during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;
>
> **(ii)** voter identification, *get-out-the-vote activity*, or generic campaign activity conducted *in connection with an election in which a candidate for Federal office appears on the ballot* (regardless of whether a candidate for State or local office also appears on the ballot);

> **(iii)** a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or
>
> **(iv)** services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

52 U.S.C. 30101(20)(A) (emphasis added).

14. In constructing a coherent scheme of campaign finance regulation, Congress recognized that, given the close ties between federal candidates and state party committees, BCRA's restrictions on national committee activity would be ineffective if state and local committees remained available as conduits for soft-money donations. The BCRA is, therefore, designed to curb state committees' ability to use large soft-money contributions to influence federal elections by preventing donors from contributing nonfederal funds to state and local party committees to help finance "Federal election activity." As a result, all activities that fall within the statutory definition of "Federal election activity" must be funded with money that is subject to federal regulation.

15. Title I of BCRA establishes restrictions on campaign expenditures by a state political party that provide indirect support for a federal candidate that could influence the outcome of a federal election, even when the campaign activity does not mention a federal candidate or even the federal election by name. In particular, campaign activity that can influence the outcome of a federal election by increasing voter turnout is made subject to federal regulation by the BCRA. Pursuant to 52 U.S.C. § 30125(b)(2), any amount expended for "Federal election activity" –

including voter registration and GOTV activity – by a state political party is subject to Title I of the BCRA and must be funded from a political party's federal account.

16. Regulations promulgated by the Federal Election Commission confirm this regulatory scheme. In conjunction with the enactment of FECA, Congress created the Federal Election Commission ("FEC"), which is charged with the administration and enforcement of the FECA. Pursuant to its rulemaking authority, the FEC has adopted regulations defining each of the components of "Federal election activity." *See* 11 C.F.R. § 100.24.

With respect to "voter registration activity," 11 C.F.R. § 100.24(a)(2)(i) provides:

> Voter registration activity means:
>
> > (A) Encouraging or urging voters to register to vote . . . .
> >
> > (B) Preparing and distributing information about registration and voting;
> >
> > (C) Distributing voter registration forms or instructions to potential voters;
> >
> > (D) Answering questions about how to complete or file a voter registration form, or assisting potential voters in completing or filing such forms;
> >
> > (E) Submitting or delivering a completed voter registration form on behalf of a potential voter;
> >
> > (F) Offering or arranging to transport, or actually transporting potential voters to a board of elections or county clerk's office for them to fill out voter registration forms; or
> >
> > (G) Any other activity that assists potential voters to register to vote.

With respect to "get-out-the-vote activity," 11 C.F.R. § 100.24(3)(i) provides::

> Get-out-the-vote activity means:
>
> > (A) Encouraging or urging potential voters to vote, whether by mail (including direct mail), email, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMC), or by any other means;
> >
> > (B) Informing potential voters, whether by mail (including direct mail), email, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMC), or by any other means about,
> >
> > (1) Times when polling places are open;
> >
> > (2) The location of particular polling places; or
> >
> > (3) Early voting or voting by absentee ballot;
> >
> > (C) Offering or arranging to transport, or actually transporting, potential voters to the polls; or
> >
> > (D) Any other activity that assists potential voters to vote.

11 C.F.R. § 100.24(a)(3) (September 10, 2010).

17. FEC regulations exclude from the definition of "Federal election activity" a "public communication that refers solely to one or more clearly identified candidates for State or local office and that does not promote or support, or attack or oppose a clearly identified candidate for Federal office;" however, this is subject to the proviso *"that such a public communication shall be considered a Federal election activity if it constitutes voter registration activity . . .[or] get-out-the-vote activity . . . ."* 11 C.F.R. § 100.24(c)(1) (emphasis added).

18. Notably, these regulations were revised following a determination by the United States Court of Appeals for the District of Columbia Circuit, that an earlier version of the regulations – in defining "voter registration" and "get-out-the vote" activities – had created unacceptable "loopholes" that undermined the statutory scheme of the BCRA by "allow[ing] the use of soft money for many efforts that influence federal elections." *Shays v. Federal Election Commission*, 528 F.3d 914, 932 (D.C. Cir. 2008) ("'common sense dictates' that 'any efforts [by state or local parties] that increase the number of like-minded registered voters who actually do go to the polls' will 'directly assist [a] party's candidates for federal office'") (quoting *McConnell v. Federal Election Commission*, 540 U.S. 93, 167-68 (2003)). As a result, the FEC promulgated its present broader definitions of "Federal election activities" to prevent circumvention of the federal regulatory scheme. *See* 75 Fed. Reg. 55257-67 (Sept. 10, 2010).

B. Federal Preemption

19. FECA contains a preemption provision, enacted in 1974, that replaced an earlier version of the statute, which had expressly saved state laws from preemption, except where compliance with state law would result in a violation of the FECA, or would prohibit conduct permitted by the FECA. FECA's current preemption provision states:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt *any provision of State law with respect to election to Federal office*.

52 U.S.C. § 30143(a) (emphasis added).

20. The legislative history of this provision shows that Congress intended "to make certain that the Federal law is construed to *occupy the field* with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 1239, 93d Cong., 2d Sess. 10 (1974) (emphasis added). More

specifically, Congress intended "Federal law [to] occupy the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees." S. Rep. No. 93-1237 (1974) (Conf. Rep.), reprinted in 1974 U.S.C.C.A.N. 5587, 5668.

21. FECA's preemption provision specifically incorporates by reference "rules prescribed under" FECA, and, pursuant to its authority, the FEC has issued a regulation interpreting the scope of § 30143(a). This regulation provides as follows, in pertinent part:

> (a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.
>
> (b) Federal law supersedes State law concerning the –
>
> ....
>
> (3) Limitation on contributions and expenditures by Federal candidates and political committees.

11 C.F.R. § 108.7 (2014).

22. Consistent with FECA's statutory preemption provision, 52 U.S.C. § 30143(a), and its enabling regulation, 11 C.F.R. § 108.7 (2014), courts and the FEC have both consistently found that FECA preempts state campaign finance laws with respect to campaign activities that might influence federal elections.

THE CONNECTICUT REGULATORY SCHEME

23. In response to "pay-to-play" corruption concerns, Connecticut, beginning in 2005, enacted a series of campaign finance reforms designed, *inter alia*, to regulate campaign contributions by state contractors. *See* Conn. Gen. Stat. § 9-612(f); *see generally* Title 9, Chapter 155.

24. As a result of the separate regulatory requirements of Connecticut and the Federal government, Petitioner maintains multiple accounts as repositories for contributions from various sources, including federal accounts that are subject to federal regulation and a state account that is subject to state regulation. Connecticut election law precludes the use of contributions from state contractors for the benefit of candidates for state office, *see* Conn. Gen. Stat. § 9-612(f); however, it does not prevent Connecticut state contractors from contributing to Petitioner's federal account. Accordingly, it is Petitioner's practice to place contributions from state contractors into one of its federal accounts.

25. Specifically, Petitioner maintains multiple federal accounts, including a "federal account" which serves as a repository for contributions from individuals, federal political committees and federal Political Action Committees ("PACs"), and a "federal limited account" which lawfully receives contributions, *inter alia*, from state contractors and state lobbyists. Although not required by state or federal law, Petitioner – to comply with the spirit of Connecticut's election laws – restricts its expenditures from the federal limited account to purely federal activity that cannot confer even an incidental benefit on state candidates. Expenditures from the federal account – as required by federal law – are used, *inter alia*, to pay for all "federal

election activity," including "voter registration" and "get-out-the-vote" activity, as defined by federal law.

26. It is Petitioner's belief (1) that its continual voter registration and GOTV activities (including its future use of mailers similar in form to the mailers attached hereto as Exhibit A) constitute "federal election activity" (*i.e.*, "voter registration activity" and "get-out-the-vote" activity) and, therefore, must be paid for from funds subject to federal regulation, and (2) that to the extent Connecticut's campaign finance laws prohibit payment for such activities from Petitioner's federal funds, they are preempted by federal law.[3]

THE COMMISSION SHOULD ISSUE A DECLARATORY RULING THAT PETITIONER'S VOTER REGISTRATION AND GOTV ACTIVITIES ARE EXCLUSIVELY SUBJECT TO FEDERAL CAMPAIGN FINANCE REGULATION

27. The Commission's regulations, § 9-7b-64, provide authority for "any person" to petition the Commission "for a declaratory ruling as to the validity of any of its regulations, or the applicability to specified circumstances of any provision of Chapter 150 of the General Statutes, a regulation or a final decision on a matter within the Commission's jurisdiction."

28. Petitioner intends, in the future, to engage in substantially continual voter registration and GOTV activities in preparation for Connecticut's biennial Congressional elections. Petitioner believes that those activities – which are protected by federal law and the First Amendment to the United States Constitution – constitute "Federal election activities" as defined

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[3] Petitioner notes that, in keeping with the spirit of Connecticut law, its use of contributions from Connecticut state contractors continue to be subject to the restrictions that are placed on expenditures made out of its "federal limited account."

in 52 U.S.C. 30101(20)(A) and 11 C.F.R. § 100.24(a)(3). Accordingly, Petitioner believes it is required to pay for such activities out of funds that are subject to federal regulation; and that any state law or regulation to the contrary is pre-empted by 52 U.S.C. § 30143(a) and 11 C.F.R. § 108.7 (2014).

29. Petitioner also intends, in the future, to use mailers that are substantially similar in form to those attached as Exhibit A hereto. Focusing on those mailers, which provide an example of the issues presented in this Petition, Petitioner notes that each – although referring only to candidates for state office – contains "get-out-the-vote" information that constitutes "Federal election activity" within the meaning of 52 U.S.C. § 30101(20)(A)(20) and 11 C.F.R. 100.24(a)(3)(i)(B) &(C). The mailers, front and back, "urg[e] potential voters to vote," 11 C.F.R. § 100.24(a)(3)(i)(A), provide the date of the election and the "[t]imes when polling places are open," *id.* § 100.24(a)(3)(i)(B)(3), and "offer[ ] ... to transport . . . potential voters to the polls." *Id.* §100.24(a)(3)(i)(C). This information unequivocally falls within the activities defined as "get-out-the-vote" activities.

30. The fact that the mailers refer only to a state candidate does not exempt them from federal regulation, because "Federal election activity" specifically includes get-out-the-vote activity "conducted in connection with an election in which a candidate for Federal office *appears on the ballot*." 52 U.S.C. § 30101(2) (emphasis added).

31. The mailers do not reflect "Excluded activity," as defined in 52 U.S.C. § 30101(20)(B). That provision states that "The term 'Federal election activity' does not include an amount expended or disbursed by a State, district or local committee of a political party for – (i) a public communication that refers solely to a clearly identified candidate for State or local

office, *if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii).*" (Emphasis added).[4] However, the mailers clearly do constitute "Federal election activity" insofar as they provide GOTV information – specifically, information concerning the times when polling places are open and transportation to the polls.

32. Finally, FEC regulations provide that (1) that "[a]ctivity is not voter registration activity solely because it includes a brief exhortation to register to vote, so long as the exhortation is incidental to a communication, activity or event;" 11 C.F.R. § 100.24(a)(2)(ii), and (2) that "[a]ctivity is not get-out-the-vote activity solely because it includes a brief exhortation to vote so long as the exhortation is incidental to a communication, activity or event." *Id.* § 100.24(a)(3)(ii). Both of these provisions explicitly refer to "exhortations" (respectively, to register and to vote), which constitute only one of the seven types of "voter registration" activities defined in § 100.24(a)(2)(i)(A) - (G), and only one of the four types of "get-out-the-vote" activities defined in § 100.24(a)(3)(i) (A) - (D). Specifically, subsection (A) of § 100.24(a)(2)(i) refers to exhortations to register (i.e., "Encouraging or urging potential voters to register to vote. . . "), and subsection (A) of § 100.24(a)(3)(ii) refers to exhortations to vote (*i.e.*, "Encouraging or urging potential voters to vote"). But subsections (B) through (G) of §

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[4] The meaning of this provision is illuminated by the FEC's September 10, 2010 response to comments in connection with the promulgation of its amended rules. There, the FEC cited with approval the following comment from a party opposing a proposed exception to the "get out the vote" ("GOTV") definition for communications that refer solely to candidates for state and local office: "[T]he fact that a communication refers solely to a State or local candidate is not sufficient to satisfy the exemption, if the communication otherwise constitutes GOTV . . . activity. . . . The key issue is not whether the communication refers solely to a non-federal candidate, but rather whether the communication is GOTV . . . activity. If it is GOTV . . . activity, it is not eligible for the exemption, even if it only refers to a state or local candidate.") 75 Fed. Reg. at 55264. The FEC rejected the proposed regulation based on this reasoning. *Id.*

100.24(a)(2)(i) do not involve such "exhortations," nor do subsections (B) through (D) of § 100.24(a)(3)(I). Rather those subsections pertain to providing, *e.g.*, information regarding registration and transportation to the polls. Accordingly, the "brief" and "incidental" language of § 100.24(a)(2)(ii) and § 100.24(a)(3)(ii) clearly does not refer at all to the provision of this sort of information reflected in the attached mailers.

33. In sum, the voter registration and GOTV activities that Petitioner wishes to engage in going forward – when performed in connection with any election in which a federal candidate is on the ballot – constitute "Federal election activity" as defined by federal law, and the expenditures required to engage in these activities must be made with funds that are subject to federal regulation. FECA supersedes and preempts any Connecticut state campaign finance laws that may be to the contrary. 52 U.S.C. § § 30143(a).

WHEREFORE, Petitioner seeks a declaratory ruling that Connecticut's campaign finance law is preempted by FECA insofar as it relates to voter registration and GOTV activities that petitioner engages in with respect to elections in which candidates for federal office appear on the ballot.

CONNECTICUT DEMOCRATIC STATE CENTRAL COMMITTEE,

BY: _____

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184 Atlantic Street
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Tel. (203) 325-4491
Email: dgolub@sgtlaw.com

Attorneys for Connecticut Democratic State Central Committee

VERIFICATION

I, Michael Mandell, Executive Director of the Connecticut Democratic State Central Committee, having read the foregoing Verified Petition, do hereby verify that it is true and correct.

MICHAEL MANDELL
Executive Director
Connecticut Democratic State Central Committee

Subscribed and sworn to, before me, this 4th day of March 2015.

~~Notary Public~~/Commissioner of the
Superior Court

Connecticut Democratic State Central Committee
30 Arbor Street, Suite 404
Hartford, CT 06106

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From passing the toughest gun laws in the nation to raising the minimum wage,

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- ***Became the first state*** in the nation to commit to increasing the minimum wage to $10.10 per hour by 2017 and providing paid sick time to workers
- ***Provided*** 256,666 people with quality, affordable health care
- ***Passed the toughest*** gun laws in the country
- ***Set the course*** for more affordable housing than we've had in the past 3 decades
- ***Created*** the earned income tax credit to help working families
- ***Helped the private sector*** create nearly 60,000 jobs and invested in our small businesses

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"The lives and the future of the children of this state will be shaped dramatically by this election...

Dan Malloy is a man of conviction who hasn't shrunk from making hard choices."

– President Bill Clinton, 9/2/14

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Connecticut Democratic State Central Committee
30 Arbor Street, Suite 404
Hartford, CT 06106

By investing nearly **$562 million** in education,

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and building a stronger economy now – and for the future.

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- Provided 256,666 people with quality, affordable health care
- Passed the toughest gun laws in the country
- Set the course for more affordable housing than we've had in the past three decades
- Created the earned income tax credit to help working families
- Helped the private sector create nearly 60,000 jobs and invested in our small businesses

On November 4th, vote for progress.

For a ride to the polls, **call 800-401-8304**.
Poll hours: **6 a.m. to 8 p.m.**

DanMalloyCT

Dan Malloy
for Governor

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While Republican governors
across the country made reckless education cuts,
Democratic Governor Dan Malloy
balanced our budget AND invested in our children.
Vote Democrat Dan Malloy for Governor
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Connecticut Democratic State Central Committee
30 Arbor Street, Suite 404
Hartford, CT 06106

"We've invested in our classrooms, increased the minimum wage and helped small businesses create jobs.

With your help on Tuesday, November 4th, we'll continue the progress."

– Governor Dan Malloy

Under Governor Malloy, Connecticut:

- **Became the first state** in the nation to commit to increasing the minimum wage to $10.10 per hour by 2017 and providing paid sick time to workers
- **Provided** 256,666 people with quality, affordable health care
- **Passed the toughest** gun laws in the country
- **Set the course** for more affordable housing than we've had in the past 3 decades
- **Created** the earned income tax credit to help working families
- **Helped the private sector** create nearly 60,000 jobs and invested in our small businesses

ON NOVEMBER 4TH, VOTE FOR PROGRESS

Democrat

Dan Malloy

for Governor

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Vote Democrat Dan Malloy for Governor on Tuesday, November 4th.
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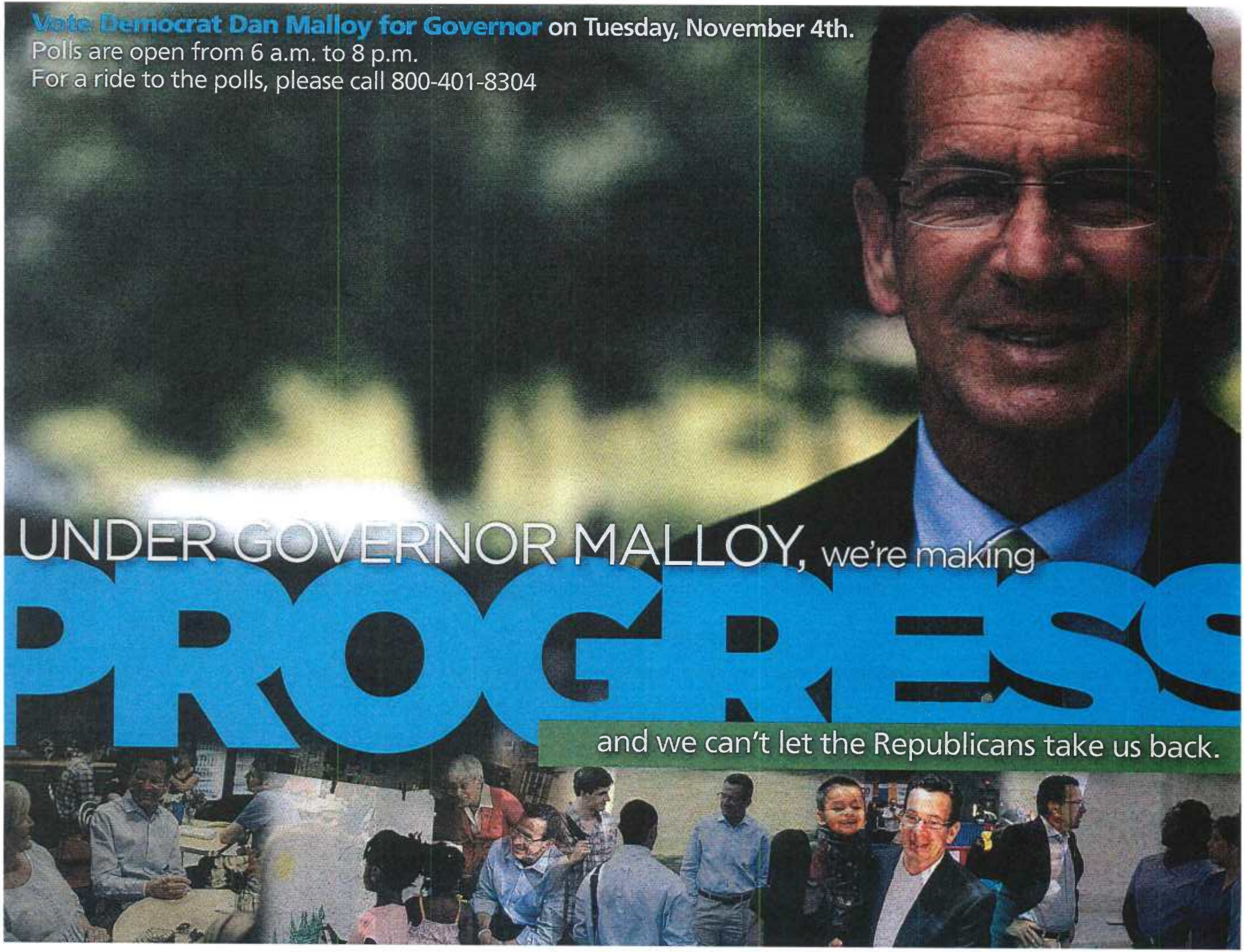

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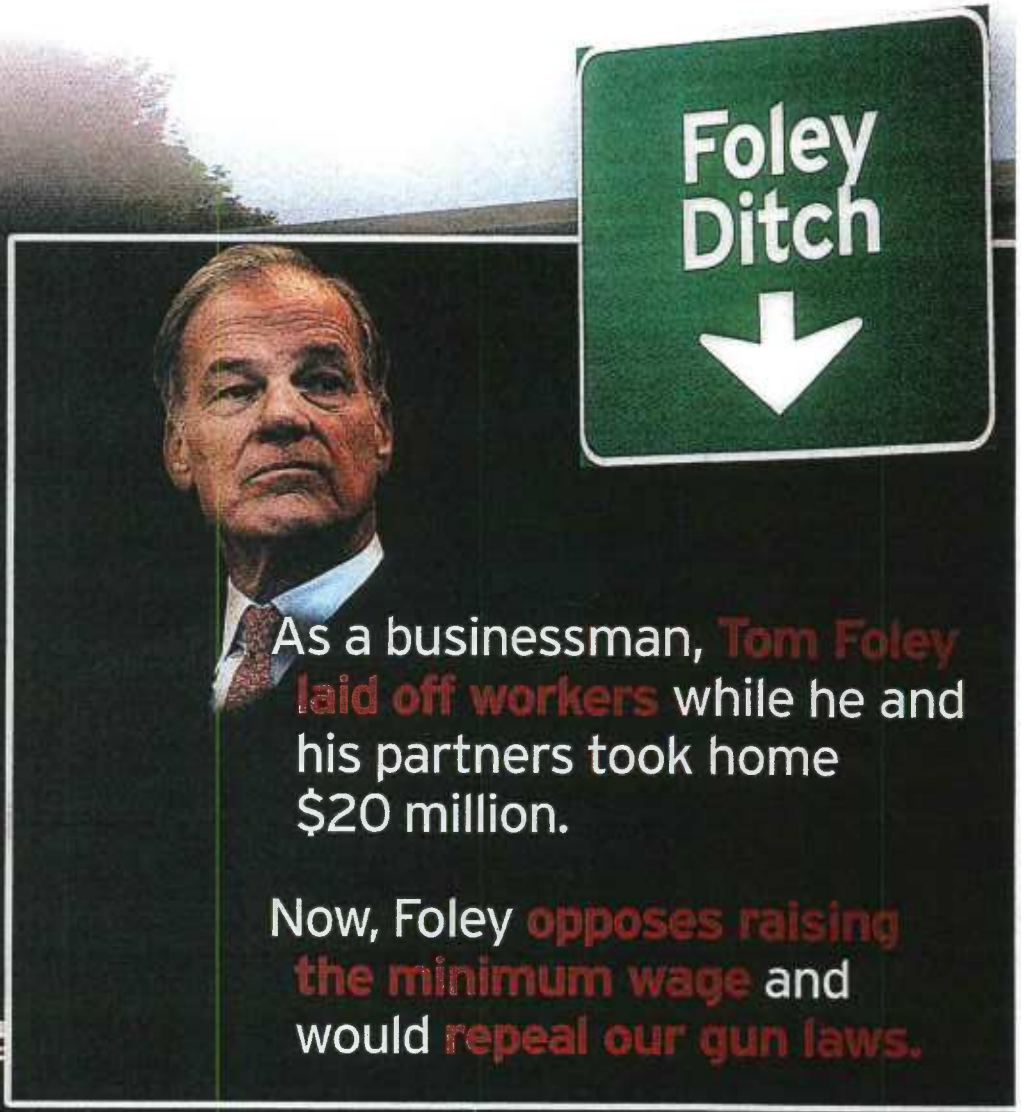

As a businessman, **Tom Foley laid off workers** while he and his partners took home $20 million.

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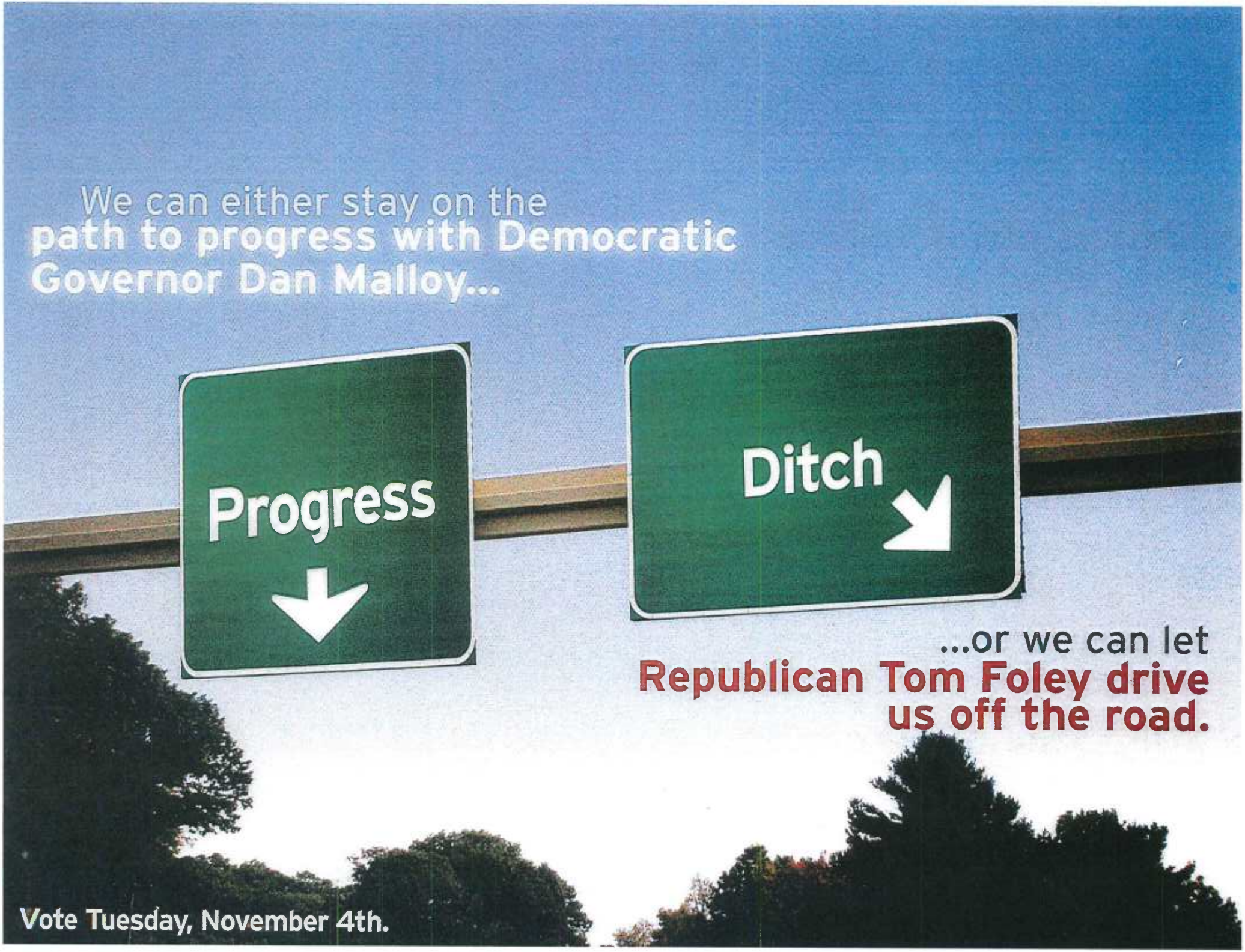
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...or we can let
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"We'll start making progress again, and we'll make progress together. We will share the benefits, just like we shared the responsibilities. That's what works and why Dan Malloy and Nancy Wyman should be overwhelmingly re-elected in November.

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-Bill Clinton

Vote Tuesday, November 4th

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Polls are open from 6 a.m. to 8 p.m.

"Dan Malloy doesn't want the credit.
He wants you to give him four more years so
he can finish the job."

- Bill Clinton

STATE OF CONNECTICUT
ELECTIONS ENFORCEMENT COMMISSION

IN RE PETITION OF CONNECTICUT
DEMOCRATIC STATE CENTRAL COMMITTEE

MEMORANDUM IN SUPPORT OF THE CONNECTICUT DEMOCRATIC STATE CENTRAL COMMITTEE'S PETITION FOR A DECLARATORY RULING

INTRODUCTION

The Connecticut Democratic State Central Committee ("Petitioner") submits this Memorandum in support of its accompanying Petition for a Declaratory Ruling, filed pursuant to Gen Stats. §§ 4-175 & 4-176 and § 9-7b-64 of the Rules of Practice of the Connecticut State Elections Enforcement Commission (the "Commission").

Petitioner seeks a declaratory ruling to determine its rights and obligations under conflicting provisions of federal and state campaign finance laws. Under the Federal Election Campaign Act of 1971 ("FECA"), "Federal election activities," including voter registration and "get-out-the-vote" ("GOTV") activities relating to elections in which federal candidates are on the ballot, must be paid for with "hard money" – *i.e.*, money which is subject to federal regulation. The use of money raised and spent on "Federal election activities" outside of the regulatory framework provided by FECA is prohibited by federal law. FECA further provides that the federal campaign finance laws, where applicable, preempt state law and occupy the field. *See* 52 U.S.C. § 30143(a).

In light of these requirements, Petitioner maintains "federal" accounts, which are funded solely by money that has been contributed in accordance with federal regulations, and expenditures out of those accounts are made in compliance with federal law. Petitioner is permitted under federal law to receive (into its federal accounts) contributions from contractors who do business with the State of Connecticut, and it is required to make expenditures out of those accounts to finance "Federal election activities."

Under Connecticut campaign finance law, Petitioner would be barred from using money from its federal accounts to fund voter registration and GOTV activities in Connecticut in connection with elections in which federal candidates are on the ballot if such activities mention or relate to state candidates, because federal funds are not subject to state campaign finance regulation – especially with respect to contributions made by contractors who do business with Connecticut. *See* Gen. Stat. § 9-612(f); *see generally* Gen. Stat. Title 9, Chapter 155.

As shown in the accompanying Petition (¶ 4), Petitioner engages in continual voter registration and GOTV activities in Connecticut in preparation for each biennial Congressional election. Representatives of this Commission have, in the recent past, informed Petitioner that they believe the use of federal funds to finance voter registration and GOTV activities violates Connecticut's campaign finance laws – despite the fact that federal law requires Petitioner to finance such activities out of federal funds whenever candidates for federal office are on the ballot in an upcoming election and expressly preempts state law in the same field. More broadly, the Commission has taken the position that Connecticut's campaign finance laws are controlling with respect to all communications which refer only to candidates for state office, even though such communications also constitute voter registration or GOTV activity, as defined by federal

law. As the Commission recently stated in its decision in *In the Matter of Complaint by Andreas Duus, III* , Sept. 16, 2014 (File No. 2013-176):

> General Statutes § 9-612(f) does not prevent a Connecticut state contractor from contributing to the federal account of a state central party committee. However, the Commission notes there could be scenarios where the Commission might consider such contributions by a state contractor to a state central committee's federal account in connection with subsequent expenditures as problematic under Connecticut's campaign finance laws. See General Statutes §§ 9-601c, 9-612(f) and 9-622(5). See also Advisory Opinion 2014-001, *The Use of Federal and State Accounts of Party Committees*, advising that Connecticut state party committees with state and federal accounts must pay for their expenses for state candidates with money raised within the Connecticut financing system, i.e., from permissible contributions properly reported under Connecticut law. Federal law does not create a loophole in Connecticut campaign finance laws that would allow federal committees to make expenditures that are also contributions regarding Connecticut candidates. State Committees should structure their plans to comply with both state and federal law. In some instances this may mean, for example, that they cannot support state or federal candidates within the same communication . . . .

Id. ¶ 8. *See also* Commission Advisory Opinion 2014-01, p. 6 (adopted February 11, 2014).

Petitioners believe this statement by the Commission fundamentally misapprehends the effect of FECA preemption on Petitioner's campaign finance law obligations. Petitioner believes – contrary to the Commission's statements on this issue – that, in areas where state and federal campaign finance law overlap in their coverage, federal law occupies the field and, therefore, supersedes state law. Nonetheless, based on the Commission's position, its representatives have recently threatened Petitioner with sanctions if it fails to adhere to the Commission's view of this issue.[1]

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[1] Petitioner notes, however, that the Commission has elsewhere acknowledged that these issues reflect a "gray area," and – in a recent submission to the Federal Election Commission ("FEC") – the Commission has asked the FEC to clarify them. *See* October 12, 2014 Letter from the Commission to the FEC, re: Advisory Opinion Request 2014-16, p. 7.

The issue raised in the Petition has recently arisen in connection with Petitioner's use of certain "mailers" in Connecticut's 2014 state and federal election. Those mailers, although pertaining specifically to a state candidate (Governor Dan Malloy), also – on the front and the back of each mailer – called on recipients to vote, specified the date of the election, and provided recipients with information regarding the times when polling places were open and the availability of transportation to the polls. Activities and communications that are not otherwise exempted from the regulation containing such information, when used in connection with elections in which federal candidates are on the ballot, are specifically defined in Federal election law as constituting GOTV activities, *see* 11 C.F.R. § 100.24(a)(3) (September 10, 2010), which must be financed with money that is subject to federal regulation.

Although federal regulation of such activities preempts the field, 52 U.S.C. § 30143(a); 11 C.F.R. § 108.7 (2014), and supersedes state regulation affecting the same activities, the Republican Party of Connecticut ("Republican Party"), on the eve of the most recent election, filed an extremely disruptive action in Hartford Superior Court – challenging Petitioner's campaign finance practices based, in part, on Petitioner's use of the mailers described above. In that action, the Republican Party sought (1) to enjoin Petitioner from using the mailer at issue, and (2) to obtain a mandatory injunction that, if granted, would have deprived the Dan Malloy for Governor Candidate Committee of funds with which to continue its campaign. *See* Verified Complaint for Declaratory and Injunctive Relief, dated October 17, 2014, in *Republican Party of Connecticut v. Democratic Party of Connecticut*, HHD CV 14-6054730-S. Although this action was ultimately dismissed due to the Republican Party's failure to exhaust its administrative remedies, the underlying issue of federal preemption has not been resolved and will likely re-

surface in connection with future biennial elections as Petitioner continues its voter registration and GOTV activities.[2] As a result, Petitioner has a specific, personal and legal interest in obtaining a definitive resolution of the issue set forth above.

In light of the foregoing facts and circumstances, the Petition herein seeks a declaratory ruling on the issue of whether Connecticut's campaign finance laws are preempted by federal law with respect to the funding of "Federal election activities," including voter registration and GOTV activities, when those activities relate to an election in which a federal candidate is on the ballot, even where materials used in furtherance of those activities do not refer to a candidate for federal office, and even though those materials only refer to a candidate for state office.

STATEMENT OF THE CASE

A. The Federal Regulatory Scheme.

1. Voter Registration and GOTV Activity.

The Federal Election Campaign Act, originally enacted in 1971 and now codified at 52 U.S.C. § 30101, *et seq.*, sets forth "an intricate federal statutory scheme governing campaign contributions and expenditures related to federal elections." *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996). The "primary purpose [of the Act] is to regulate campaign contributions and expenditures in order to eliminate pernicious influence – actual or perceived – over candidates by those who contribute large sums of money." *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1281 (5th Cir. 1994).

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[2] The Republican Party is now pursuing the same issues before the Commission. Representatives of the Commission have informed Petitioner that the Commission does not intend to adjudicate the preemption issues raised in the Petition filed herewith.

In 2002, Congress – concerned with the use of soft money by national, state and local political parties to bypass the requirements of FECA – enacted the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Public Law 107-155 (2002). In adopting the BCRA, Congress recognized the potentially corrupting influence of campaign contributions used to influence the outcome of federal elections through *indirect* means – such as voter registration and GOTV activity. The BRCA makes clear that restrictions on the use of federal campaign funds for federal election activities extend beyond direct support for federal candidates and apply to campaign activities by state political parties that can affect the outcome of federal elections even when the activities do not specifically refer to federal candidates. *See Shays v. Federal Election Commission*, 508 F. Supp.2d 10, 65 (D.D.C. 2007), *aff'd in part, rev'd in part and remd'd*, 528 F.3d (14 (D.C. Cir. 2008); *McConnell v. Federal Election Commission*, 540 U.S 93, 161, 164, 167-68 (2003).

To prevent the use of non-federal funds to influence federal elections in an indirect manner, the BRCA expressly applies FECA campaign expenditure restrictions to any "Federal election activity," a term defined in the Act and in the Act's implementing regulations, *see* 52 U.S.C. 30101(20)(A); 11 C.F.R. § 100.24, irrespective of whether the activity directly supports or names a particular federal candidate or even mentions a federal election. As applicable here, Title I of the BCRA imposes restrictions on the expenditure of funds by state and local political parties that might influence the outcome of federal elections, even when those communications only reference non-federal candidates.

Thus, the Act defines "Federal election activity" to mean any of the following:

> **(i)** *voter registration activity* during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;
>
> **(ii)** voter identification, *get-out-the-vote activity*, or generic campaign activity conducted *in connection with an election in which a candidate for Federal office appears on the ballot* (regardless of whether a candidate for State or local office also appears on the ballot);
>
> **(iii)** a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or
>
> **(iv)** services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

52 U.S.C. 30101(20)(A) (emphasis added).

As the United States Supreme Court has explained:

> In constructing a coherent scheme of campaign finance regulation, Congress recognized that, given the close ties between federal candidates and state party committees, BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations. Section 323(b) is designed to foreclose wholesale evasion of § 323(a)'s anticorruption measures by sharply curbing state committees' ability to use large soft-money contributions to influence federal elections. The core of § 323(b) is a straightforward contribution regulation: It prevents donors from contributing nonfederal funds to state and local party committees to help finance "Federal election activity." 2 U.S.C. § 441i(b)(1) (Supp. II). .... All activities that fall within the statutory definition must be funded with hard money. § 441i(b)(1).

McConnell, 540 U.S. at 161-62 (emphasis added).

Title I of BRCA, thus, establishes restrictions on campaign expenditures by a state political party that provide indirect support for a federal candidate that could influence the outcome of a federal election, even when the campaign activity does not mention a federal candidate or even the federal election by name. In particular, campaign activity that can influence the outcome of a federal election by increasing voter turnout is made subject to federal regulation by BRCA. Pursuant to 52 U.S.C. § 30125(b)(2) (formerly 2 U.S.C. 441i(b)(2)), any amount expended for "Federal election activity" – including "voter registration" and GOTV activity" – by a state political party is subject to the Title I of BRCA and must be funded from a political party's federal account. *McConnell*, 540 U.S. at 162.[3]

In conjunction with the enactment of FECA, Congress created the Federal Election Commission ("FEC"), "which is empowered with the administration and enforcement of the Act." *Bunning v. Com. of Kentucky*, 42 F.3d 1008, 1011 (6th Cir. 1994). "Congress delegated [to] the FEC extensive rulemaking and adjudicative powers and authorized it to prescribe rules and regulations to carry out the provisions of FECA." *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993). "The FEC is also empowered to give advisory opinions when requested." *Id.*; *see* 52 U.S.C. §§ 30107(a)(7), 30108.

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[3] Title 52 U.S.C. § 30125(b)(1) provides:

> Except as provided in paragraph (2), an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

Pursuant to its rulemaking authority, the FEC has adopted regulations defining each of the components of "Federal election activity."

With respect to "voter registration activity," 11 C.F.R. § 100.24(a)(2)(i) provides:

> Voter registration activity means:
>
> > (A) Encouraging or urging voters to register to vote . . . .
> >
> > (B) Preparing and distributing information about registration and voting;
> >
> > (C) Distributing voter registration forms or instructions to potential voters;
> >
> > (D) Answering questions about how to complete or file a voter registration form, or assisting potential voters in completing or filing such forms;
> >
> > (E) Submitting or delivering a completed voter registration form on behalf of a potential voter;
> >
> > (F) Offering or arranging to transport, or actually transporting potential voters to a board of elections or county clerk's office for them to fill out voter registration forms; or
> >
> > (G) Any other activity that assists potential voters to register to vote.

With respect to GOTV activity, 11 C.F.R. § 100.24(a)(3)(i) provides:

> Get-out-the-vote activity means:
>
> > (A) Encouraging or urging potential voters to vote, whether by mail (including direct mail), email, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMC), or by any other means;
> >
> > (B) Informing potential voters, whether by mail (including direct mail), email, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMC), or by any other means about,
> >
> > > (1) Times when polling places are open;
> > >
> > > (2) The location of particular polling places; or

(3) Early voting or voting by absentee ballot;

(C) Offering or arranging to transport, or actually transporting, potential voters to the polls;

(D) Any other activity that assists potential voters to vote.

FEC regulations exclude from the definition of "Federal election activity" a "public communication that refers solely to one or more clearly identified candidates for State or local office and that does not promote or support, or attack or oppose a clearly identified candidate for Federal office;" however, this is subject to the proviso *"that such a public communication shall be considered a Federal election activity if it constitutes . . . voter registration activity . . . [or] get-out-the-vote activity . . . ."* 11 C.F.R. § 100.24(c)(1) (emphasis added).

Notably, these regulations were revised in response to a determination by the United States Court of Appeals for the District of Columbia Circuit, that an earlier version of the regulations – in its definition of "voter registration" and GOTV activity – had created unacceptable "loopholes" that undermined the statutory scheme of the BCRA by "allow[ing] the use of soft money for many efforts that influence federal elections." *Shays v. Federal Election Commission*, 528 F.3d 914, 932 (D.C. Cir. 2008) ("'common sense dictates' that 'any efforts [by state or local parties] that increase the number of like-minded registered voters who actually do go to the polls' will 'directly assist [a] party's candidates for federal office'") (quoting *McConnell v. Federal Election Commission*, 540 U.S. 93, 167-68 (2003)). As a result, the FEC promulgated its present broader definitions of "voter registration" and "GOTV" activities to prevent circumvention of the federal regulatory scheme. *See* 75 Fed. Reg. 55257-67 (Sept. 10, 2010).

2. Federal Preemption

FECA contains a preemption provision, enacted in 1974, that "replaced a prior version [of the statute] which expressly saved state laws from preemption, except where compliance with state law would result in a violation of the FECA, or would prohibit conduct permitted by the FECA." *Bunning*, 42 F.3d at 1012. The preemption provision of the FECA provides:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

52 U.S.C. § 30143(a).

The "House Committee that drafted the current provision intended 'to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated.'" *Teper*, 82 F.3d at 994 (quoting H.R. Rep. No. 1239, 93d Cong., 2d Sess. at 10 (1974)). The legislative history to the current preemption provision demonstrates that Congress intended "Federal law [to] occupy the field with respect to reporting and disclosure of political contribution to and expenditures by Federal candidates and political committees." S. Rep. No. 93-1237 (1974) (Conf. Rep.), reprinted in 1974 U.S.C.C.A.N. 5587, 5668.

Significantly, the FECA's "preemption provision specifically 'incorporates by reference "rules prescribed under" [the] FECA,' and, pursuant to its authority, 'the FEC has issued a regulation interpreting the scope of [the preemption] provision in accordance with the statute's plain language and its legislative history.'" *New Hampshire Attorney General v. Bass Victory Committee*, 104 A.3d 181, 187 (N.H. 2014), *quoting Krikorian v. Ohio Elections Commission*, No. 1:10cv 103, 2010 WL 4117556, at *11 (S.D. Ohio Oct. 19, 2010).

The applicable regulation interpreting the scope of FECA's preemption provision provides, in pertinent part:

> (a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.
>
> (b) Federal law supersedes State law concerning the –
> ....
>
> (3) Limitation on contributions and expenditures by Federal candidates and political committees.

11 C.F.R. § 108.7 (2014).

Consistent with the statutory preemption provision, 52 U.S.C. § 30143(a), and its enabling regulation, 11 C.F.R. § 108.7 (2014), courts and the FEC itself have without exception held that the FECA preempts state campaign financing laws with respect to campaign activities that might influence federal elections. *See e.g.*, *Weber*, 995 F.2d at 877 (Minnesota Congressional Campaign Reform Act providing for public financing for federal congressional candidates preempted by FECA); *Bunning*, 42 F.3d at 1008; *Teper*, 82 F.3d at 998; FEC Advisory Opinion 2000-24 (December 18, 2000); *Bass Victory Committee*, 104 A.3d at 187-88; FEC Advisory Opinions 2012-10; 2009-21; 2000-24; 2000-23; 1998-8; 1998-7; 1997-14; 1995-48; 1994-2; 1993-25; 1993-17; 1993-14; 1993-9; 1991-5; 1989-25; 1986-40; 1983-8.

B. Connecticut's Regulatory Scheme

In response to "pay-to-play" corruption concerns, Connecticut, beginning in 2005, enacted a series of campaign finance reforms designed, *inter alia*, to regulate campaign contributions by state contractors. *See, e.g.*, Gen Stat. § 9-612(f), *see generally* Gen. Stat. Title 9, Chapter 155.

As a result of the separate regulatory requirements of Connecticut and the Federal government, Petitioner maintains multiple accounts as repositories for contributions from various sources, including federal accounts that are subject to federal regulation and a state account that is subject to state regulation. Connecticut election law precludes the use of contributions from state contractors for the benefit of candidates for state office; however, it does not prevent Connecticut state contractors from contributing to Petitioner's federal account. Conn. Gen. Stat. § 9-612(f). Accordingly, it is Petitioner's practice to place contributions from state contractors into one of its federal accounts.

Specifically, Petitioner maintains multiple federal accounts, including, *inter alia*, a "federal account" which serves as a repository for contributions from individuals, federal political committees and federal Political Action Committees ("PACs"), and a "federal limited account" which lawfully receives contributions, *inter alia*, from state contractors and state lobbyists. Although not required by state or federal law, Petitioner – to comply with the spirit of Connecticut's election laws – restricts its expenditures from the federal limited account to purely federal activity that cannot confer even an incidental benefit on state candidates. Expenditures from the federal account – as required by federal law – are used, *inter alia*, to pay for all "federal election activity," including "voter registration" and "GOTV" activity, as defined by federal law.

Petitioner submits that the "voter registration" and "get-out-the-vote" activity described in the Petition, including the mailer that was the subject of the Republican Party's lawsuit, constitute "federal election activity" and, therefore, must be paid for from funds subject to federal regulation. Petitioner notes, however, that – in keeping with the intent of Connecticut's "pay-to-play" restrictions – Petitioner's use of contributions from Connecticut state contractors are, and

will continue to be, subject to the restrictions that are placed on expenditures made out of its "limited federal account."

ARGUMENT

A. FECA Preempts Connecticut Campaign Finance Law With Respect to the Voter Registration and GOTV Activity Described in the Petition

Because Petitioner's ongoing voter registration and GOTV activities (as exemplified by the mailers) constitute "Federal election activity," FECA, supersedes and preempts any Connecticut state campaign finance laws that purport to regulate "voter registration" or "GOTV" activity for any election in which federal candidates are seeking office. 52 U.S.C. § § 30143(a); *see also* 11 C.F.R. § 108.7 (2014). And, as shown above, both the legislative history of FECA and numerous judicial and administrative decisions have confirmed that the preemption provided for in FECA and the FEC preemption regulations is intended to occupy the field, thereby superseding all state regulation that might otherwise apply to the same conduct. *See, e.g., Teper*, 82 F.3d at 994 (quoting H.R. Rep. No. 1239, at 10 (1974)); S. Rep. No. 93-1237 (1974) (Conf. Rep.), reprinted in 1974 U.S.C.C.A.N. 5587, 5668 (Congress intended "Federal law [to] occupy the field with respect to reporting and disclosure of political contribution to and expenditures by Federal candidates and political committees"); *Weber*, 995 F.2d at 877; *Bunning*, 42 F.3d at 1008; *Teper*, 82 F.3d at 998; FEC Advisory Opinion 2000-24 (December 18, 2000); *Bass Victory Committee*, 104 A.3d at 187-88; FEC Advisory Opinions 2012-10; 2009-21; 2000-24; 2000-23; 1998-8; 1998-7; 1997-14; 1995-48; 1994-2; 1993-25; 1993-17; 1993-14; 1993-9; 1991-5; 1989-25; 1986-40; 1983-8.

As exemplified by the mailers attached to the Petition herein as Exhibit A, the GOTV activities that Petitioner intends to engage in constitute "Federal election activities" and must be paid for with federal funds. Petitioner intends in the future to use mailers substantially similar in form to those attached to the Petition as Exhibit A. The mailers, front and back, urge potential voters to vote, set forth the date of the election, and provide specific information about "times when polling places are open," and the availability of transportation "to transport potential voters to the polls." Accordingly, the mailers, fall squarely within FECA's definition of "get-out-the-vote activity," and, despite the fact that the mailers refer exclusively to a state candidate (Governor Malloy), and support his reelection, they plainly constitute "Federal election activity" within the meaning of FECA and are subject to the campaign expenditure requirements of FECA. Pursuant to FECA, the Democratic Party is required to pay for the mailer from a federal funds account. 52 U.S.C. § 30125(b)(2); 11 C.F.R. § 300.33(e)(1).[4]

The fact that the mailers refer only to a state candidate does not exempt them from federal regulation, because "Federal election activity" specifically includes get-out-the-vote activity "conducted in connection with an election in which a candidate for Federal office *appears on the ballot*." 52 U.S.C. § 30101(2) (emphasis added). That was the case in 2014, and it will also be the case in each biennial election hereafter.

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[4] FECA allows state political parties, under certain circumstances, to allocate expenditures for "get-out-the-vote activity" between federal account funds and state account funds, but in no event can more than 85% of state accounts be used for such purposes for the 2014 cycle. Whether or not a state political party so allocates, an expenditure for "get-out-the-vote activity" in an election where federal and state candidates are both on the ballot must be paid, initially, from a federal funds account. *See* 11 C.F.R. § 300.32(c)(4) (The disbursements for allocable Federal election activity must be paid for either entirely with Federal funds or by allocating between Federal funds and Levin funds according to 11 C.F.R. § 300.33). The decision to allocate is at the sole discretion of the state party. 11 C.F.R. § 300.32(c)(4).

The mailers also do not reflect "Excluded activity," as defined in 52 U.S.C. § 30101(20)(B). That provision states that "[t]he term 'Federal election activity' does not include an amount expended or disbursed by a State, district or local committee of a political party for – (i) a public communication that refers solely to a clearly identified candidate for State or local office, *if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii).*" (Emphasis added). However, the Mailers clearly do constitute "Federal election activity" because they provide information concerning the times when polling places are open and transportation to the polls.[5]

Finally, FEC regulations provide (1) that "[a]ctivity is not voter registration activity solely because it includes a brief exhortation to register to vote, so long as the exhortation is incidental to a communication, activity or event;" 11 C.F.R. § 100.24(a)(2)(ii), and (2) that "[a]ctivity is not get-out-the-vote activity solely because it includes a brief exhortation to vote so long as the exhortation is incidental to a communication, activity or event." *Id.* § 100.24(a)(3)(ii). Both of these provisions explicitly refer to "exhortations" (respectively, to register and to vote); however, "exhortations" constitute only one of the seven types of "voter registration" activities defined in § 100.24(a)(2)(i)(A) - (G), and only one of the four types of "get-out-the-vote" activities defined in

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[5] The meaning of this provision is illuminated by the FEC's September 10, 2010 response to comments in connection with the promulgation of its amended rules. There, the FEC cited with approval the following comment from a party opposing a proposed exception to the "get out the vote" definition for communications that refer solely to candidates for state and local office: "[T]he fact that a communication refers solely to a State or local candidate is not sufficient to satisfy the exemption, if the communication otherwise constitutes GOTV . . . activity. . . . The key issue is not whether the communication refers solely to a non-federal candidate, but rather whether the communication is GOTV . . . activity. If it is GOTV . . . activity, it is not eligible for the exemption, even if it only refers to a state or local candidate.") 75 Fed. Reg. at 55264. The FEC rejected the proposed regulation based on this reasoning. *Id.*

§ 100.24(a)(3)(i) (A) - (D). Specifically, subsection (A) of § 100.24(a)(2)(i) refers to exhortations to register (*i.e.*, "Encouraging or urging potential voters to register to vote. . . "), and subsection (A) of § 100.24(a)(3)(ii) refers to exhortations to vote (*i.e.*, "Encouraging or urging potential voters to vote. . . ."). But subsections (B) through (G) of § 100.24(a)(2)(i) do not involve such "exhortations," nor do subsections (B) through (D) of § 100.24(a)(3)(I). Rather those subsections pertain to providing, *e.g.*, information regarding registration and transportation to the polls. Accordingly, the "brief" and "incidental" language of § 100.24(a)(2)(ii) and § 100.24(a)(3)(ii) simply does not refer to the provision of this sort of information reflected in the attached mailers.

This interpretation is strongly supported by the decision of the United States Court of Appeals for the District of Columbia which required the FEC to revise its rules to their present form. *Shays*, 528 F.3d at 932. That decision makes it clear that the concern underlying the "incidental" language in the present rule was to ensure that "mere exhortations to get out and vote or register to vote made at the end of a political event or speech would not count as federal election activity." *Id.* The court instructed the FEC to craft a definition that would "exempt such routine or spontaneous speech-ending exhortations without opening a gaping loophole permitting state parties to use soft money" to influence federal elections. *Id.* The present language of 11 C.F.R. § 100.24 (a)(2) and (3) – focusing on "exhortations" – is the result.

Connecticut's campaign finance laws are, thus, preempted to the extent they might otherwise apply to Petitioner's voter registration and GOTV activities.

B. Petitioner is Entitled to Issuance of a Declaratory Ruling Affirming that Connecticut Campaign Finance Laws Are Preempted with respect to the Voter Registration and GOTV Activity Described in the Petition.

Petitioner has a specific and personal interest, in engaging in its important voter registration and GOTV activities, without interruption from partisan lawsuits, in a manner that complies with the applicable law. And there is also no doubt that there is a threatened application of Connecticut's campaign finance laws that can interfere with or impair Petitioner's ability to engage in these activities. As shown above, the Republican Party of Connecticut brought an extremely disruptive injunction action on the eve of Connecticut's most recent state and federal election in which it sought to use a mailer similar to those at issue here as a lever to cut Governor Malloy off from certain sources of funding at a crucial point in the election. *See* Republican Party Complaint, ¶¶ 44, 50), in *Republican Party of Connecticut v. Democratic Party of Connecticut*, HHD CV 14-6054730-S (filed October 17, 2014). Moreover, as stated in the Petition (¶ 4) this Commission has taken the position that Connecticut campaign finance law is controlling with respect to all communications which refer only to candidates for state office, even though such communications also constitute voter registration or GOTV activity, as defined by federal law. *See, e.g.*, SEEC Advisory Opinion 2014-01, p. 6 (adopted February 11, 2014). Indeed, based on this view of the law, representatives of the Commission have threatened Petitioner with civil and criminal sanctions if it fails to adhere to the Commission's position on this issue. (Petition ¶ 4). However, while taking this position, the Commission has also acknowledged, in its recent letter to the FEC, that these issues reflect a "gray area," and asked the FEC to clarify them. *See* October 12, 2014 Letter from the Commission to the FEC, re: Advisory Opinion Request 2014-16, p. 7.

Accordingly, Petitioner faces a very real risk that – unless this issue is resolved now – it will resurface in the future, in the middle of a campaign, and disrupt Petitioner's ability to assist candidates of the Democratic Party in their campaigns.

CONCLUSION

For the reasons stated above, and in the accompanying Petition, the Commission should issue a ruling declaring that Connecticut's campaign finance law is preempted by FECA insofar as it relates to the voter registration and GOTV activities that petitioner intends to engage in with respect to elections in which candidates for federal office appear on the ballot.

CONNECTICUT DEMOCRATIC STATE CENTRAL COMMITTEE,

BY: _____

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